Supreme Court, U.S.
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No. 87-1582

In The

Supreme Court of the United States

October Term, 1987

FRANK BORING FITZGERALD,
Appellant,

v.

STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS

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Pursuant to Rule 16.1 of the Rules of this Court, the Appellees, State of Montana, Department of Family Services, Eugene Huntington, Director, move that the appeal from the judgment of the Supreme Court of Montana be dismissed.

OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 741 P.2d 770. The opinion of the Supreme Court of Montana in a previous appeal is reported at 201 Mont. 400, 654 P.2d 994.

JURISDICTION

The judgment of the Supreme Court of Montana was entered on August 20, 1987 and a motion for rehearing was denied September 17, 1987. The notice of appeal to this Court was filed October 1, 1987. App. 194-195. The corrected jurisdictional statement was served April 12, 1988. The jurisdiction of this Court is alternatively invoked as an appeal under 28 U.S.C. § 1257(2); as a petition for writ of certiorari under 28 U.S.C. § 2103(1) and as a petition for writ of habeas corpus under 28 U.S.C. § 2254(a).

———o———

STATEMENT OF THE CASE

M.G.M., the child who is the subject of this case, was born out of wedlock on June 10, 1972 and resided with only her mother until 1979. At that time, the Department of Social and Rehabilitation Services (SRS)[1] instituted dependency and neglect proceedings under section 41-3-401, MCA which, in 1980, resulted in termination of the mother's parental rights. During the pendency of the termination proceedings, appellant filed a notice of paternity and unsuccessfully attempted to intervene in the termination proceedings. Subsequent to the termination of the mother's rights, SRS filed a petition for temporary investigative authority and later, a dependency and neglect proceeding against appellant. These proceedings were consolidated with a paternity action filed under sections

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[1]In 1987, the child welfare responsibilities of SRS were legislatively transferred to the Department of Family Services.

40-6-107 to 116, MCA by the child's guardian ad litem. The district court declared appellant the natural father of M.G.M. The court then held a series of hearings resulting in a determination based on the psychiatric and psychological evaluations of appellant and other evidence that it would be in the best interest of M.G.M. to grant her custody to SRS and terminate appellant's parental rights. App. 66-77.

Appellant appealed the order of the district court to the Montana Supreme Court. *In the Matter of M.G.M.*, 201 Mont. 400 (1982). The Montana Supreme Court reversed the judgment and remanded for further findings. The reversal was based on the district court's failure to determine whether M.G.M. was abused, dependent or neglected as defined in statute before proceeding to the best interest standard.

During the pendency of the matter on remand, the appellant, the state and the guardian ad litem agreed by stipulation to placing M.G.M. in appellant's physical custody for six weeks during the summer of 1985. App. 48-55. The placement was to be monitored by psychologist Richard Agosto. If M.G.M. suffered or was likely to suffer any substantial impairment of her psychological or intellectual functioning, she was to return permanently to the custody of SRS. In fact, Dr. Agosto did find such substantial impairment and SRS petitioned the court to find M.G.M. a youth in need of care. On September 2, 1986, the district court found M.G.M. to be a youth in need of care, continued her custody with SRS and allowed appellant regular visitation. App. 28-47. Appellant appealed to the Montana Supreme Court. On August 20,

1987, the Montana Supreme Court affirmed the district court decision and appellant now appeals to this Court.

ARGUMENT

1. Appellant seeks to have this Court invoke jurisdiction of the case as an appeal under 28 U.S.C. § 1257(2). In the alternative, appellant seeks to have his action treated as a writ of certiorari. The facts of the case and the opinions of the Montana Supreme Court do not evidence any challenge by appellant as to the validity of a statute on federal grounds or federal question.

In the original appeal to the Montana Supreme Court, the issues raised by appellant were stated by the court as:

> (1) Whether the District Court erred by applying the "best interests of the child" test in section 40-6-130(1), MCA, instead of the "abuse and neglect" standards in sections 41-3-401, MCA, et seq.?
>
> (2) Whether there is clear and convincing evidence to support either the "best interests of the child" test or the "abuse and neglect" test?
>
> (3) Whether psychiatric nurse, Mary Honaker, was qualified to give an expert opinion and diagnosis of appellant's mental health?

Matter of M.G.M., 201 Mont. 400, 405, 654 P.2d 994, 997 (1982); App. 78-91. At this juncture, appellant raised only factual matters and the applicability of state law. No federal question was raised. No federal constitutional or statutory challenge was made to the state statutes.

2. Appellant's second appeal to the Montana Supreme Court is equally devoid of an issue cognizable by this Court. Appellant raised only one issue: "Are the District Court's findings of fact and conclusions of law supported by clear and convincing evidence." *In the Matter of M.G.M.*, — Mont. —, 741 P.2d 770, 772 (1987) App. 1-12. Clearly this issue deals solely with factual matters presented in the case. This Court has consistently articulated the burden on appellants to properly structure issues in the lower courts in order to invoke the jurisdiction of this Court. In *Parker v. McLain*, 237 U.S. 469 (1915), this Court said:

> Our jurisdiction to review the judgment of the highest court of a State turns upon whether a Federal right was specifically set up or claimed in that court and derived by its decision. (Citation omitted)

Id. at 471. Appellant has failed to claim any federal right in the state courts and the decision of the state court was not based upon a federal right. Appellant cannot now raise a federal question to invoke jurisdiction on appeal in this Court.

3. If all else fails, Appellant seeks to have this case treated as an application for a writ of habeas corpus under 28 U.S.C. § 2254(b). Appellant, however, does not have standing to apply for the writ. He is not seeking to have himself released from custody. Neither is he the guardian of M.G.M., the one he does seek to have released. Additionally, appellant must have presented the state court with the opportunity to rule on any federal issues upon which he bases his application for writ of habeas corpus. *Picard v. Connor*, 404 U.S. 270 (1971). As pre-

viously discussed, appellant has raised no federal issues in the state courts, nor shown that no state remedies are available to him. *Batchelor v. Cupp,* 693 F.2d 859, 962 (9th Cir. 1982).

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CONCLUSION

For the reasons explained above, this case does not present any federal question presented and ruled upon in the Montana Supreme Court. The Montana Supreme Court decisions dealt only with the application of state statutes and factual questions. Further Appellant does not have standing to apply for a writ of habeas corpus. The appeal or petition for writ of certiorari or application for writ of habeas corpus should be dismissed.

Respectfully submitted,

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Dated: May 1988